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CASE NO.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1981

JESSIE JOSEPH TAFERO,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Florida filed on June 11, 1981.

Citation to Opinion Below

The opinion of the Supreme Court of Florida, Case No. 49,535, is reported as Tafero v. State, 403 So.2d 355 (Fla. 1981) and is attached hereto as Appendix A.

Jurisdiction

The judgment of the Supreme Court of Florida was filed on June 11, 1981 and rehearing was denied on September 29, 1981. An extension of time for filing a petition for writ of certiorari until December 28, 1981 was granted by Justice Powell on November 16, 1981. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257 (3), petitioner having asserted below and asserting herein deprivation of rights secured by the Constitution of the United States

Questions Presented

1. Whether a purported waiver of a sentence less than death by a capital defendant can be presumed to be proper absent some assurance in the record that such waiver is entered voluntarily and with a full understanding of the waiver and its consequences?

2. Whether a sentence of death may constitutionally be imposed where the record affirmatively shows that consideration of nonenumerated mitigating circumstances was restricted by the trial court?

3. Whether a waiver of the Sixth and Fourteenth Amendment "right to defend oneself" can be presumed from a silent record where there is an objection by the defendant to counsel's conduct of the defense and where the defendant had made clear to the court from the outset of the case that he intended to be a full participant in his own defense and had participated in his own defense?

4. Whether, consistent with the Eighth and Fourteenth Amendment requirements in a capital case, the harmless error test promulgated in United States v. Agurs, 427 U.S. 97 (1976) may be employed where the prosecution fails to disclose material evidence within its control relevant to the credibility of a key prosecution witness whose testimony formed the sole basis for establishing both a purported motive for the offense and a particular aggravating circumstance relied upon to impose and uphold the sentence of death?

Constitutional and Statutory Provisions Involved

1. This case involves Amendments VI, VIII, and XIV of the Constitution of the United States.

2. This case involves Section 921.141, Florida Statutes (1977), the text of which is reproduced and set out in Appendix C attached hereto.

Statement of the Case

On March 4, 1976 an indictment was filed charging petitioner, Sonia Jacobs Linder and Walter Norman Rhodes, Jr. with two counts of first degree murder, one count of robbery and one count of kidnapping (R I 1-3). Petitioner appeared for arraignment on March 8, 1976, was adjudicated insolvent and the Office of the Public Defender was appointed to represent petitioner (R I 4); the assistant public defender waived arraignment and the court entered

pleas of not guilty on all counts (RI 4). However, since the assistant public defender had not consulted with petitioner about arraignment and petitioner did not fully understand the proceedings (SR IV 2-3), this arraignment was held April 1, 1976 (RI 28; SR IV 4-7); petitioner then expressly stood mute and the court entered not guilty pleas "to reserve any rights that you feel you may have there" (SR IV 7). The Public Defender's motion to withdraw as counsel due to a conflict (RI 7) was granted and Robert S. McCain, Esq. was appointed to represent petitioner.

Numerous pretrial motions were filed that were submitted jointly by petitioner and his counsel, by petitioner pro se and by defense counsel alone. On the first scheduled day of trial petitioner filed a written "Objection to Trial" (Motion to Continue) based upon the state's "piecemeal" discovery responses which motion was denied (RI 56-57; R III 4-7); petitioner also moved to sequester the jury due to "extraordinary publicity" and this motion was denied (RI 58, 59;RII 7-9).

Petitioner was tried separately from the co-defendants. Trial by jury commenced on May 10, 1976 and on May 17, 1976 after deliberating five hours the jury returned verdicts of guilt as to all four counts (RI 100; R II 150-153; S 37).

The penalty phase of the trial was held the next morning May 18, 1976 (R II 158, S 45). The jury returned an advisory sentence of death as to counts I and II (RII 159, 167-167A, S 61). The trial court then sentenced petitioner to consecutive sentences of life imprisonment for counts III and IV (RII 160, 168-171, S 64-66). Subsequently, on May 20, 1976, the trial judge filed his written sentence and findings of fact relating to the death sentence (RII 172-176). A timely appeal was taken to the Supreme Court of Florida which affirmed the judgments and sentences of the trial court. Tafero v. State, 403 So.2d 355 (Fla. 1981).

This case involves the death of a highway patrol trooper and a Canadian constable who was riding with him. It was alleged that petitioner, Walter Norman Rhodes and Sonia Jacobs were sleeping in a Camaro at a rest area on I-95 in northern Broward County when the trooper stopped to investigate; after some discussion

and after petitioner and Walter Rhodes had gotten out of the Camaro, petitioner struggled with the trooper, and then shots were fired and the trooper and the constable were killed. According to the testimony of Walter Rhodes, Jacobs fired the first shots from the Camaro and then petitioner went over to the Camaro, got the gun, sat on the bottom of the door ledge and fired the reamining shots. The two eyewitness called by the state testified that petitioner was being held over the hood of the car with his hand held behind him at the time the shots were fired. After the shooting, Walter Rhodes, Sonia Jacobs, and petitioner allegedly picked up the trooper's gun and drove away in the trooper's car went to an apartment complex where they allegedly switched cars by forcing the owner to accompany them in his Cadillac. They were stopped at a roadblock in Palm Beach County when the officers fired at the car with shotguns.

Walter Rhodes entered a plea of guilty to lesser charges in return for his testimony. Sonia Jacobs was tried in a separate trial held after petitioner's trial. She was acquitted of the robbery charge and convicted of two counts of first degree murder and of kidnapping. On appeal the Supreme Court of Florida affirmed her convictions and vacated her death sentences. Jacobs v. State, 396 So.2d 713 (Fla. 1981).

The eyewitness testimony consisted of two truck drivers who were present at the I-95 rest area at the time of the incident. The first witness was Pierce M. Hyman who was parked approximately 150 feet directly behind the vehicles (R III 18-19). From his truck, Mr. Hyman saw the trooper bent over in the open door of the Camaro (R III 21). Behind the trooper he saw a man wearing a T-shirt (the Canadian constable) (R III 22-23). A man (Walter Rhodes) was standing in front of the Camaro (R III 23-24). The trooper then went around the front of his car and used the radio (R III 24-25) and then returned.

There was a man sitting in the driver's seat of the Camaro who had a goatee, wearing a brown jacket (petitioner) who had gotten out of the Camaro before the trooper returned (R III 25-26). The man walked over to the grass "like he was stretching"

and then walked back between the cars and leaned on the front fender of the Camaro (R III 27). The trooper then grabbed the shoulder of petitioner, pulled petitioner's arm behind his back and pushed him to the hood of the patrol car (R III 29). The "fellow in the T-shirt" pushed petitioner further over the hood of the car, holding petitioner's arm behind his back (R III 29) and pointed a gun back and forth between Rhodes and petitioner who was still being held over the hood with his arm "up around his back" (R III 30).

The trooper then turned to his right toward the Camaro. One shot was fired and he turned to the left toward his car away from the Camaro (R III 31). Then "there were several shots fired in rapid succession" (R III 31). While the shots were fired, Rhodes remained in the front of the Camaro with his hands up and petitioner began scuffling with the Canadian who was holding petitioner over the hood of the trooper car (R III 32-33). Mr. Hyman said the shots "appeared" to come from "out of the back of the Camaro" (R III 33). Rhodes then got in the driver's seat of the patrol car (R III 33). Petitioner opened the passenger door of the trooper's car and reached toward the Camaro and there was a baby handed out. A male and a female got out of the Camaro and got into the back seat of the trooper's car (R III 34). The trooper car then pulled out. He never saw petitioner bend over the trooper and get his gun (R III 57).

The second eyewitness was Robert McKenzie, a tractor-trailer driver. When he pulled into the rest area at 7:10 A.M. the trooper was between the cars talking to a man with a beard and a brown jacket (petitioner) (R III 62-63). A man in a T-shirt was standing next to the trooper (R III 64). Rhodes was standing in front of the Camaro (R III 65). Petitioner pointed to the bushes and went over to the tree ("I guess he had to go to the bathroom") (R III 69). Petitioner came back between the cars and began talking with the trooper again. Petitioner sat down in the Camero and then stood up and had a suitcase that he placed on top of the car (R III 71-72). The trooper "snatched the suitcase" and threw it into the back seat of his car (R III 72-73).

Mr. McKenzie then began pulling out of the rest area

because he wanted to know who was in the Camaro (R III 73-74). In the car he saw someone with long hair and a blue shirt (Sonia Jacobs) (R III 74). He watched through his rearview mirrow and saw the trooper begin to search petitioner. Petitioner jumped back and they began to swing at each other -- the trooper swung first (R III 75). The trooper got petitioner's arm behind his back and pushed him over the car. The "guy with the white shirt" took over holding petitioner (R III 76). The trooper pulled his gun and pointed at both petitioner and Rhodes (R III 76-77). Petitioner was still being held by the Canadian over the trooper car with his hands behind his back (R III 76-77). The trooper used his radio and then returned to the rear of his car and swung at Rhodes (R III 79, 92). The trooper turned and pointed his gun at petitioner and the Canadian who was holding him (R III 80).

Mr. McKenzie came as close as 50 feet from the cars (R III 84, 91). He then heard some "fast shots." The trooper fell instantly and "the other guy" (the Canadian) fell right behind him. Rhodes ran between the cars to the door of the trooper car (R III 81, 94). Petitioner turned around after the shots were fired (R III 81, 95). The Canadian had ahold of petitioner, pushing him against the trooper car, with petitioner's left arm behind his back (R III 94). Petitioner turned after the shots had been fired (R III 95).

The only other witness to testify regarding the events at the scene of the alleged homicides was the co-defendant, Walter Norman Rhodes, Jr. Mr. Rhodes had entered pleas to substantially reducedcharges in return for his testimony against petitioner and Sonia Jacobs (R III 12). Rhodes stated that on February 19, 1976 they went to Miami but whoever they went to see was not home, so at Rhodes' suggestion, they went to the rest area on I-95, arriving at 2:00 A.M. (R IV 265-267). They slept in the Camaro. Rhodes testified that he woke up when the trooper was looking through the window, "mumbling something" and opening the door (R IV 267-268). When he opened the door, the trooper immediately bent down and picked up the nine millimeter pistol that Rhodes had been wearing (R IV 269-270). According to Rhodes, he noticed petitioner pass a nine millimeter pistol between the

bucket seats "to the rear, toward Sonia" (R IV 274). The trooper called Rhodes over to his car and asked who his probation officer was (R IV 275). The trooper then told Rhodes to stand in front of the trooper's car (R IV 276). The man in plain clothes with the trooper was standing near the left rear window of the Camero (R IV 272, 277, 280). According to Rhodes the man stood by the Camaro "the whole time" (R IV 277).

According to Rhodes the trooper then "violently" told everybody to get out of the car and "bring all of your weapons" (R IV 280). Rhodes testified that when petitioner got out he and the trooper began scuffling and the trooper was trying to get petitioner against the trooper's car (R IV 281-282). Then "Irwin[the Canadian] must have grabbed him because [petitioner] was still up against the car' (R IV 283). The trooper then used his radio from the passenger side of his car (R IV 284). Rhodes testified that he saw petitioner and the trooper scuffling (R IV 285). The testimony of Rhodes was that the fight moved out between the cars and petitioner had both his hands on the trooper's right arm which held the gun (R IV 285).

Rhodes stated that he then heard two shots and "the second one was a distinctly loud boom, not like the nine millimeter ..." (R IV 286). Rhodes testified that he turned around and saw the trooper who was "frozen" with his gun in his right hand which was "hanging down" (R IV 286). He said Ms. Jacobs looked scared and had a nine millimeter pistol in her hand (R IV 286). According to Rhodes petitioner went to the Camaro and took the gun out of her hand; he leaned back against the driver's seat and fired up at an angle. Rhodes said petitioner fired four shots at the trooper (R IV 287) and then fired two shots at Irwin. Rhodes got in the driver's seat of the trooper car (R IV 289). Rhodes had lost count of the number of felony convictions he had, but he had been on the wrong side of the law most of his juvenile and adult life (R IV 310).

A number of other witnesses testified regarding technical matters (i.e. medical examiner, ballistics, crime scene, etc). To establish an alleged motive, the prosecution offered the

testimony of Ellis Marlow Haskew. Near the end of the evidence, the prosecutor announced he had a new witness who in the "witness-marshal program" who had been given a new identity so "we don't know where he lives, or anything about him" (R VI 635). The court allowed defense counsel to speak with the witness for thirty minutes (R VI 637). Petitioner objected to the testimony as going to the character of the petitioner (R VI 638), and requested further time to investigate the substance of the testimony, especially to locate other specific persons mentioned by the witness (R VI 638). Further, petitioner had a witness which he would need time to locate, who would testify that petitioner was not with the witness at that time (R VI 638-639). The trial court overruled the objection and allowed the witness to testify (R VI 640). The witness, Ellis Marlowe Haskew, testified that petitioner (R VI 641) was at his apartment in North Miami, at 1:30 A.M. New Years of 1976 (R VI 641-642) and that petitioner mentioned that he had no intention of returning to prison (R VI 642). Petitioner later renewed his request for adjournment to locate the persons referred to by Haskew (R VIII 359).

After the jury returned its verdicts of guilt, the penalty trial was held. The prosecution presented evidence of two prior convictions and no evidence or argument was presented on behalf of petitioner. After the jury returned its verdict of recommending the death penalty, the trial judge sentenced petitioner to death. The sentencing judge made the following findings regarding aggravating and mitigating circumstances:

> (1.) Both murders were committed by the Defendant while he was on parole and while he was actually a fugitive from justice.
>
> (2.) The Defendant does have a significant history of prior criminal activity involving the use or threat of violence to the person of another. The Defendant was convicted of the crime of Assault with Intent to Commit Rape on December 28th, 1967 in Dade County, Florida and was sentenced to five years in State Prison. The Defendant was convicted of the crime of Crime Against Nature in Case #67-5285A in Dade County on December 28th, 1967 and was sentenced to five years imprisonment to be served consecutively with Case #67-5284A. In Case #67-5284A, the Defendant JESSIE JOSEPH TAFERO, was found guilty of Breaking and Entering an Apartment Dwelling and Assaulting Persons Lawfully

Therein, and he was sentenced to five years imprisonment on December 28th, 1967

(3.) MR. TAFERO knowingly created a great risk of death to many persons. MR. TAFERO was found guilty of Kidnapping, as charged in Count #4 in the Indictment, and in the attempt to escape arrest for the Murders and Robbery, MR. TAFFERO, along with other co-defendants, attempted to run through a roadblock which was established by law enforcement agencies in Palm Beach County and caused an accident, thereby endangering the lives of many people.

(4.) The Murders were committed by MR. TAFERO for the purpose of avoiding or preventing lawful arrest or effecting an escape from custody. Evidence presented to this Court indicated beyond any reasonable doubt that MR. TAFERO was on parole and he had indicated to his friends that he would never again go back to prison and that this desire to avoid any future imprisonment was one of the reasons that MR. TAFERO was personally armed with an automatic pistol on most occasions.

(5.) The Murders were committed to hinder the lawful enforcement of the laws of this State. The victims of these murders, two law enforcement officers, were attempting to enforce the laws of this State after discovering various firearms and various types of drugs and controlled substances in the automobile in which the Defendant was a passenger.

(6.) The Murders were especially heinous, atrocious and cruel. Trooper Phillip A. Black was shot four times with armor-piercing ammunition and Mr. Donald Irwin was shot twice with the same weapon. Also it should be noted that Mr. Irwin, the victim as alleged in Count #2 of the Indictment, was completely unarmed.

This Court makes the additional finding that pursuant to F.S. 921.141 (b), there are no mitigating circumstances present in this case.

(R II 173-175).

On appeal the Supreme Court of Florida invalidated the aggravating circumstances found by the sentencing judge in paragraphs 3 and 6, above, but nevertheless affirmed the death sentence imposed upon petitioner. 403 So.2d at 362.

the Supreme Court of Florida failed to address any guidelines and decided the question contrary to settled constitutional standards. It is because of the importance of the question and the need for constitutional guidelines, that certiorari should be granted by this Court.

It is not a novel requirement that a waiver of fundamental constitutional rights be and appear on the record to be knowledgeable and voluntary. This Court dealt with a situation analogous to the present case in Boykin v. Alabama, 395 U.S. 238(1969). That decision recognized the constitutional standards for the valid entry of a plea of guilty. In Boykin v. Alabama, supra, this Court recognized the wide and conclusive nature of the waiver of fundamental constitutional rights involved in a plea of guilty,including the waiver of the right to confrontation, the right to trial by jury and the guarantee against self-incrimination. Id. at 243. It was thus held that:

> "We cannot presume a waiver of these three important federal constitutional rights from a silent record."

(Emphasis supplied) Id. This Court further explained:

> "What is at stake for an accused facing death or imprisonment demands the utmost solicitude of which courts are capable in canvassing the matter with the accused to make sure he has a full understanding of what the plea connotes and of its consequence. When a judge discharges that function, he leaves a record adequate for any review that may be later sought... and forestalls the spin-off collateral proceedings that seek to probe murky memories."

(Emphasis supplied; citations and footnotes omitted) Id. at 243-244.

The constitutional requirements, as well as the concomitant policy reasons, that were recognized in Boykin apply with equal measure to the purported waiver involved in the present case. A plea of guilty has been described as "perhaps the most devastating waiver possible under our Constitution." Dukes v. Warden , 406 U.S. 250, 258 (1972) (Stewart, J. concurring). The purported waiver in the present case is likewise devastating, involving petitioner's very life.

A waiver such as that in the present case is a waiver

REASONS FOR GRANTING THE WRIT

I

A PURPORTED WAIVER OF A SENTENCE LESS THAN DEATH BY A DEFENDANT CANNOT BE PRESUMED TO BE PROPER WITHOUT SOME ASSURANCES IN THE RECORD THAT SUCH WAIVER IS ENTERED VOLUNTARILY AND WITH A FULL UNDERSTANDING OF THE WAIVER AND ITS CONSEQUENCES.

In the present case in the penalty trial, defense counsel did not present any evidence or argument on behalf of petitioner relative to the death penalty. Instead, after the prosecutor presented its evidence and argument defense counsel told the jury that petitioner did not feel he received a fair trial and would not beg for his life. Nothing more was done or said on petitioner's behalf regarding sentencing and the death sentence was immediately imposed.

The question thus presented is whether in a capital penalty trial a purported waiver of the defendant's right to present, argue and/or have considered mitigating factors may be presumed to be voluntary and intelligent where the record is silent as to the defendant's understanding of the waiver? Or should a voluntary and intelligent waiver only be presumed where the record in same manner demonstrates that the defendant understood his rights and voluntarily waived them?

The question is significant both because of the unique severity of the penalty at stake and because the situation arises with relative frequency in capital cases.[1] The question has not been addressed by this Court, but with the increasing use of capital punishment in Florida and throughout the country, it is a question which promises to arise repeatedly in direct appeal or later post-conviction litigation until some constitutional guidelines are established. In the present case, although directly presented with the federal constitutional question,

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[1] Cf. Evans v. Bennett, 440 U.S. 1301 (1979) (Opinion by Justice Rehnquist in chambers); Gilmore v. Utah, 429 U.S. 1012 (1976); Lenhard v. Wolff, 443 U.S. 1306 (1979).

of all rights to contest the imposition of the death sentence or even to have all factors considered and weighed as is constitutionally required. It can no longer be doubted that the right to present and have considered all factors in mitigation is a fundamental constitutional right. In Lockett v. Ohio, 438 U.S. 586 (1978) the plurality opinion made clear that the Eighth Amendment requires that the capital defendant have the right to present and have considered as a mitigating factor "any aspect of the defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." Id. at 604. The fundamental nature of this constitutional right to present and have considered mitigating factors was reaffirmed in Green v. Georgia, 442 U.S. 95 (1979) where this Court found that precluding a capital defendant from presenting certain mitigating evidence in the penalty proceedings "denied petitioner a fair trial on the issue of punishment" and "constituted a violation of the Due Process Clause of the Fourteenth Amendment." Id. at 97. The right to present and have considered mitigating factors in a capital case is thus so fundamental as to be incorporated within those rights guaranteed by the due process clause. The fundamental nature of that right in capital cases is no longer in doubt; abrogation of that right to have mitigating circumstances considered goes to the very heart of the constitutionality of capital sentencing. E.g. Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (plurality opinion); Jurek v. Texas, 428 U.S. 262, 271-272 (1976) (plurality opinion); Roberts (Harry) v. Louisiana, 431 U.S. 633, 637 (1977). There is much at stake in a capital sentencing trial; where all factors are not considered, it "creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty." Lockett v. Ohio, supra, 438 U.S. at 605 (plurality opinion). And, as this Court emphasized:

> "When the choice is between life and death, that risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments."

Id.

That risk obtains in the present case. The purported waiver of petitioner's fundamental constitutional right to present or have considered all factors in mitigation was at least as "devastating" as the waiver involved in a plea of guilty. All that remained in the choice between life and death was the imposition of the death penalty. The death sentence is presumed the proper sentence under Florida law unless mitigating circumstances are presented to outweigh aggravating factors:

> "When one or more of the aggravating circumstances is found, death is presumed to be the proper sentence unless it or they are overridden by one or more of the mitigating circumstances provided in Fla. Stat. §921.141 (7)."

State v. Dixon, 283 So.2d 1, 9 (Fla. 1973). In the present case the prosecution had already presented evidence supporting at least two aggravating circumstances,[2] thus the purported waiver of petitioner's right to present, argue and have considered all factors in mitigation, left remaining only the imposition of the sentence of death.[3] It was indeed a "devastating" waiver. It was in essence the waiver of a life sentence. Certainly, just as in Boykin, the "utmost solicitude of which Courts are capable" is demanded where the waiver of such fundamental rights is at stake. With a silent record it cannot be presumed that petitioner fully understood the nature of the purported waiver nor its consequences.

Capital cases are different than any other. The punishment of death is "profoundly different from all other penalties." Lockett v. Ohio, supra, 438 U.S. at 605. And this

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[2] The prosecutor had presented evidence of petitioner's prior convictions to establish the aggravating circumstance provided by Section 921.141 (5)(b), Florida Statutes. Also petitioner had been convicted of robbery and kidnapping along with the homicide conviction which, under the State's theory, supported the aggravating circumstance provided in Section 921.141 (5)(c), Florida Statutes.

[3] Thus, the waiver in the present case was wholly different than a situation where the defendant chooses not to present a defense in a guilt/innocence trial. In the latter situation a defendant may choose to rely upon the failure of the prosecutor to prove every element of the charged offense beyond a reasonable doubt. Whereas in a capital sentencing trial, once an aggravating factor is shown, the death penalty will be imposed unless the defendant establishes some mitigating factors to outweigh the aggravating. Unlike the guilt/innocence trial, the capital sentencing trial is a weighing process of aggravating against mitigating factors.

profound qualitative difference entails a greater and unique need for reliability in the determination that death is the appropriate punishment in a specific case. Woodson v. North Carolina, 428 U.S. 280, 304-05 (1976) (plurality opinion). This "greater degree of reliability" required where death is imposed, Lockett v. Ohio, supra, 438 U.S. at 604 calls for special scrutiny of the procedures followed in imposing the death sentence -- with "caution increasing in degree as the offenses dealt with increase in gravity," Patton v. United States, 281 U.S. 276, 313 (1930). Therefore, it is of "vital importance to the defendant and to the community that any decision to impose the death sentence, be and appear to be, based on reason rather than caprice or emotion." Gardner v. Florida, 430 U.S. 349, 358(1977). A death sentence where the defendant, from a silent record, is purported to have waived any right to a life sentence, is not and does not appear to be based upon reason. A capital sentence where factors that "call for a less severe sentence", Lockett v. Ohio, supra 438 U.S. at 605, are not presented or considered is not reliable and is thus incompatible with the commands of the Eighth and Fourteenth Amendments. Accordingly, the unique need for reliability demands that a waiver of such a fundamental right not be presumed from a silent record. In a somewhat analogous context this Court refused to find a waiver by the defendant in a capital case because there was "no basis for presuming the defendant himself made a knowing and intelligent waiver." Gardner v. Florida, supra, 430 U.S. at 361. There is likewise no basis for such a presumption in the present case.

It can also be considered that the imposition of capital punishment places great pressures on all parties involved, emotions run high where the defendant's life hangs in the balance. A defendant's purported waiver of his right to a life sentence may be based upon the pressures of the moment, by irrational fears stemming from the emotionally charged atmosphere facing him, or by any manner of misconceptions about the process. Such a charged, straining, confusing situation is

precisely when the courts must function to bring a calm, rational hand to the proceedings. It thus would seem only proper for the court to determine the defendant's understanding of the such a devastating waiver. What is at stake for the defendant and for society supports the need for assurances both of the voluntariness of the purported waiver and of the reliability and evenhandness of the ultimate penalty imposed.

In the present case, after a closely, sometimes hotly, contested trial on guilt/innocence, the penalty trial was begun immediately on the morning following the verdicts. The prosecutor presented evidence of prior convictions of petitioner in support of an aggravating circumstance (Supp. Record at 47). The prosecution then presented its argument in support of the imposition of the death penalty (Supp. Record at 47-53). At the conclusion of the prosecution's argument, defense counsel stated to the court and jury:

> MR. MC CAIN: May it please the Court, and the ladies and gentlemen of the jury. I will be very brief here today, in that I have consulted with Jessie Tafero, and he feels very strongly that he did not receive a fair trial.
>
> He feels very stongly that this verdict was not fair, and he feels that, to participate in the sentencing argument in any way, would be a charade.
>
> He will not beg for his life, nor mercy.
>
> Thank you.

(Emphasis supplied) (Supp. Record at 54). The trial court then charged the jury which returned a verdict that the death sentence be imposed. The trial court immediately sentenced petitioner to death.

In the entire proceeding there was no inquiry of petitioner, there was no statement by petitioner, nor was there even any inquiry of defense counsel regarding petitioner's knowledge or understanding of the purported waiver of the right to present, argue or have considered factors in mitigation of the death sentence. The record is silent. There is no assur-

ance that petitioner understood the nature of the waiver or its consequences. No assurance of the "intentional relinquishment ... of a known right..." Johnson v. Zerbst, 304 U.S. 458, 464 (1938). At most the record shows that petitioner felt his trial on guilt/innocence was unfair; there is nothing to show that petitioner had any understanding of the penalty trial or of the fundamental right he was waiving; nothing to show that petitioner understood he was waiving his right to a life sentence. In fact defense counsel's characterization of the penalty trial as "begging for mercy" belies an understanding of the capital sentencing process, contrary to an understanding of the procedure as a weighing of specified aggravating circumstances with mitigating factors. What occurred was that defense counsel purportedly waived petitioner's right to a life sentence with no assurances whatsoever that such a devasting waiver was rational, reliable, knowing or voluntary. Such a serious, sobering waiver cannot and must not be presumed from a silent record.

On direct appeal the federal question was squarely presented to the Supreme Court of Florida, as follows:

XIII

> THE EXECUTION OF APPELLANT'S DEATH SENTENCE WOULD DEPRIVE HIM OF LIFE WITHOUT DUE PROCESS OF LAW AND SUBJECT HIM TO CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF THE FLORIDA AND UNITED STATES CONSTITUTIONS:
>
> C.
>
> The extreme penalty of death was imposed, where the trial judge failed to inquire into appellant's waiver of the right to present mitigating evidence in the sentencing phase of his trial.

The Supreme Court of Florida ruled on the question as follows:

> "We find no error in the trial judge's failure to inquire into Tafero's waiving his right to present evidence at the sentencing phase of his trial. There is no indication that Tafero did not know or understand his right."

Tafero v. State, 403 So.2d 355, 403 (Fla. 1981). The Supreme Court of Florida has thus ruled that there need be no assurances of voluntariness or understanding where a defendant purportedly

waives his fundamental right to present factors calling for a less severe penalty -- a waiver, in essence, of a sentence less than death. The Supreme Court of Florida's holding allows such a devasting waiver of important federal rights to be presumed voluntary and knowing from a silent record. Such a holding belies the fundamental nature of the rights involved and is contrary to the commands of this Court's opinion in Boykin v. Alabama, supra.

This Court should accept jurisdiction to review this serious federal question. It is a question which will arise again with relative frequency and one for which the answer is not burdensome for the courts and is supported both by sound policy reasons and by settled constitutional principles.

II

THE RECORD AFFIRMATIVELY SHOWS THAT CONSIDERATION OF NONENUMERATED MITIGATING CIRCUMSTANCES WAS RESTRICTED BY THE TRIAL COURT.

The trial judge in this capital penalty trial restricted his and the jury's consideration of mitigating factors. This restriction is demonstrated in the record by the instructions to the jury and by the judge's sentencing order and it is plainly established by a specific holding by the Supreme Court of Florida in the review of the sentence imposed upon the co-defendant. As a result, the procedure in imposing the death sentence was violative of the requirement of individualized sentencing in capital cases as mandated by the Eighth and Fourteenth Amendments. E.g. Lockett v. Ohio, 438 U.S. 586, 605, 608 (1978) (plurality opinion); Woodson v. North Carolina, 428 U.S. 280, 305, (1976) (plurality opinion); Roberts (Harry) v. Louisiana, 431 U.S. 633, 637 (1977).

The trial judge plainly believed that only mitigating circumstances expressly set out in the statute [Fla.Stat. §921.141 (6) (1977)] could be considered by the judge or jury. There need be no guessing as to the judge's misunderstanding of the capital sentencing process since the Supreme Court of Florida made an express finding regarding the same trial judge when it reviewed the sentence imposed upon a co-defendant in this cause. In reducing the co-defendant's death sentence to life imprisonment, the Supreme Court of Florida expressly found that the same trial judge:

> "...held the mistaken belief that he could not consider nonstatutory mitigating circumstances."

Jacobs v. State, 396 So.2d 713, 718 (Fla. 1981). Accordingly, in the trial of the co-defendant held shortly after the instant trial, the Supreme Court of Florida has judicially determined that the same trial judge had an incorrect and unconstitutional understanding and application of the law relating to mitigating circumstances. The judge's misknowledge of the law likewise appears in his sentencing order in which he listed only a review

of statutory mitigating circumstances and expressly stated that "pursuant to F.S. 921.141 (6), there are no mitigating circumstances." (emphasis supplied). There can be no question that the trial judge restricted consideration of mitigating factors based upon his erroneous belief.

It is not difficult to understand where the judge's "mistaken belief" arose. This trial was held before this Court's decision in Lockett v. Ohio, supra. The prevalent belief at the time of the trial is shown by the Supreme Court of Florida's decision in Cooper v. State, 336 So.2d 1133 (Fla. 1976). In Cooper the defendant had alleged error in the trial court's refusal to allow him to present mitigating evidence that was not encompassed by the statutory mitigating circumstances. The Supreme Court of Florida found that there was no error in refusing Cooper's proffered evidence upon the following reasoning:

> "[T]he Legislature chose to list the mitigating circumstances which it judged to be reliable for determining the appropriateness of a death penalty 'for the most aggravated and unmitigated of serious crimes,' and we are not free to expand the list."

(emphasis supplied; footnore omitted). Id. at 1139. With such a pronouncement from the Supreme Court of Florida, it is not difficult to understand how the trial judge arrived at his "mistaken belief" regarding the operation of the Florida capital sentencing statute. See Perry v. State, 395 So.2d 170, 174 (Fla. 1981). The Supreme Court of Florida subsequently reinterpreted its holding in Cooper to bring it within the mandate of the plurality opinion in Lockett v. Ohio, supra, but this new holding was not announced until two years after the trial of this cause. Songer v. State, 365 So.2d 696, 700 (Fla. 1978) (opinion on rehearing). Apart from the facial constitutionality of the Florida statute after its reconstruction in Songer, it remains that it was unconstitutionally applied in the present case.

The ambiguities in this sentencing process are many. If the trial judge was under a "mistaken belief" regarding the operation of the statute, it is more than probable that

the parties -- most notably defense counsel and petitioner -- were under the same "mistaken belief". Such a belief could have caused defense counsel to forego presenting or arguing valid mitigating factors he might otherwise have presented. With all parties being under a "mistaken belief", there certainly is the "risk that the death penalty [was] imposed in spite of factors which may call for a less severe penalty." Lockett v. Ohio, supra, 438 U.S. at 605. And as the plurality opinion in Lockett emphasized:

> "When the choice is between life and death, that risk is unacceptable and incompitable with the commands of the Eighth and Fourteenth Amendments."

Id.

The instructions to the jury in the penalty trial of this case likewise limited the consideration of all but the statutory mitigating circumstances. In his preliminary instructions the judge told the jury:

> "At the conclusion of the taking of the evidence and after argument of counsel, you will be instructed on the factors in aggravation and mitigation that you may consider.

(Supp. Record at 46). In the charge to the jury, the court instructed regarding aggravating circumstances as follows:

> "The aggravating circumstances which you may consider are limited to such of the following which may be established by the evidence:..."

(Supp. Record at 55). And as to mitigating circumstances, the jury was instructed:

> "The mitigating circumstances which you may consider, if established by the evidence, are these:..."

(Supp. Record at 56). Only the statutory circumstances were listed (Ibid. at 56-57).[4]

The court's instructions plainly limited the consideration of nonstatutory mitigating factors. Under circumstances

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[4] Under new standard jury instructions adopted since the trial of this cause juries in Florida are instructed: "Among the mitigating circumstances you may consider, if established by the evidence, are:..." and that the jury may consider: "Any aspect of the defendant's character or record, and any other circumstances of the offense." Florida Standard Jury Instructions In Criminal Cases, Penalty Proceedings, Capital Cases, (1981 ed.). These instructions were adopted to meet the requirements of Lockett v. Ohio, supra.

strinkingly similar to those of the present case, the Fifth Circuit Court of Appeals held that the jury instruction before it unconstitutionally limited the consideration of nonenumerated mitigating factors. Washington v. Watkins, 656 F.2d 1346, 1367-77 (5th Cir. 1981). In that case the jury was instructed on aggravating circumstances as follows:

> "Now consider only the following elements of aggravation in determining whether the death penalty should be imposed:..."

Id. at 1367. Two aggravating circumstances were listed. As to mitigating circumstances the jury had been instructed:

> "Now consider the following elements of mitigation in determining whether the death penalty should not be imposed:..."

Id. Two mitigating factors were then listed.

Accordingly, the instructions of the Mississippi trial court that were reviewed and found violative of the Eighth Amendment in Washington are very closely analogous to those given by the trial court in the instant case.

About the jury instruction reviewed in Washington, the Fifth Circuit found that while the trial court properly limited the jury's consideration of aggravating circumstances, the language of the trial court's instruction on mitigating circumstances was so similar that:

> "...a reasonable juror might well infer from this parallel syntax that the enumerated factors -- both aggravating and mitigating-- were the sole factors that he was permitted to consider in the discharge of his oath."

655 F.2d at 1370.

To the State's argument that the difference in language between the instructions on aggravating and mitigating circumstances would lead the jury to believe that mitigating factors were not limited, the Fifth Circuit found that only "an extraordinarily attentive juror might rationally have drawn such an inference ..." but nonetheless:

> "...at best the State's argument suggests that there is more than one reasonable interpretation of the crucial language in the charge; this does not mean the charge is not constitutionally infirm, for the Supreme Court has held that whether a defendant has been accorded his constitutional rights depends upon the way in which a reasonable juror could have interpreted the instruction. Sandstrom [v. Montana, 442 U.S. 510, 514 (1979)]."

Id. (Emphasis by the Court).

The Fifth Circuit concluded that:

> "[W]e must agree with Washington that the challenged jury instructions prevented the sentencer's consideration of non-statutory mitigating factors in essentially the same manner as did the Ohio statute struck down by the Lockett court."

Id. at 1373. And further:

> "In short, under Lockett, the error in the trial court's proscription of jury consideration of nonstatutory mitigating circumstances was one of constitutional proportions that violated rights secured to Washington under the Eighth and Fourteenth Amendments; given that the entire purpose of the sentencing proceedings was to determine and balance aggravating against mitigating circumstances, that error unquestionably so infected the sentencing proceedings as to drain them of fundamental fairness."

Id. at 1376.

The decision in Washington v. Watkins, supra, demonstrates the importance of the question-at-bar. In the present case the judge held the "mistaken belief" that consideration of mitigating factors was restricted and the instructions conveyed that principle to the jury. There were nonstatutory mitigating factors which could have been considered. For example, there was plain doubt from the record that petitioner was the actual triggerperson in the offense --two neutral eyewitnesses described the events in a manner which precluded petitioner's participation in the actual shooting.[5] Such a factor is a valid and important "circumstance of the offense", Lockett v. Ohio, supra, 438 U.S. at 605, that could have been weighed in mitigation. Cf. Green v. Georgia, 442 U.S. 95 (1979). Another nonstatutory mitigating factor was found by the Supreme Court of Florida in reviewing and reversing the death sentence of the co-defendant: "Ms. Jacobs was the mother of two children for whom she cared." Jacobs v. State, supra, 396 So.2d at 718. Likewise, petitioner is the father of those

[5]Two truck drivers at the scene who witnessed the entire incident testified that petitioner was bent over the hood of the patrol car at the time the shots were fired and that petitioner only turned around after the shooting had ended (Record Vol. III at 29-32, 33, 52-56, 76-78, 81, 94, 95).

same children for whom he cares. However, perhaps more importantly, with all parties below "under the mistaken belief" that consideration of mitigating circumstances was restricted only to those set out in the statute, any attempts to offer further nonstatutory evidence may have been futile and/or may have been foregone because the parties "followed the law as [they] believed it was being interpreted at the time of trial," Perry v. State, 395 So.2d 170, 174 (Fla. 1981). There are too many ambiguities in the operation of the capital sentencing statute in this case and because of the misconceptions plain on the record there is certainly the "risk that the death penalty [was] imposed in spite of factors which call for a less severe penalty." Lockett v. Ohio, supra, 438 U.S. at 605.

The federal question was directly presented to the Supreme Court of Florida on direct appeal, as follows:

XIII

> THE EXECUTION OF APPELLANT'S DEATH SENTENCE WOULD DEPRIVE HIM OF LIFE WITHOUT DUE PROCESS OF LAW AND SUBJECT HIM TO CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF THE FLORIDA AND UNITED STATES CONSTITUTIONS:
>
> B.
>
> The extreme penalty of death was imposed upon appellant on the basis of the Florida Statute which unconstitutionally limits the consideration of mitigating factors; the sentencing judge limited consideration of nonstatutory factors.

On this issue, the Supreme Court of Florida did not analyze the question but ruled solely that:

> "[W]e reiterate that the death statute provides a sufficient standard for weighing the aggravating and mitigating circumstances and that the statute is otherwise constitutional .... The statute was not unconstitutionally applied in this case."

(citations omitted). Tafero v. State, supra, 403 So.2d at 362-363. The federal question was again presented to the Supreme Court of Florida in petitioner's motion for rehearing and that motion was denied. The federal question was thus fully presented to and ruled upon by the Supreme Court of Florida.

This Court should grant certiorari in this cause to

review the significant federal question presented by the Supreme Court of Florida's approval of the procedure in this case which unconstitutionally restricted consideration of mitigating factors.

III

A WAIVER OF THE SIXTH AND FOURTEENTH AMENDMENT "RIGHT TO DEFEND ONESELF" CANNOT BE PRESUMED FROM A SILENT RECORD WHERE THERE IS AN OBJECTION BY THE DEFENDANT TO COUNSEL'S CONDUCT OF THE DEFENSE AND WHERE THE DEFENDANT HAD MADE CLEAR TO THE COURT FROM THE OUTSET OF THE CASE THAT HE INTENDED TO PARTICIPATE IN HIS OWN DEFENSE AND HAD PARTICIPATED IN HIS OWN DEFENSE.

The question-at-bar involves petitioner's personal right to participate in his own defense and/or to defend himself. Petitioner here had made plain from the very outset of the case that he intended to be a full participant in his own defense and not a mere bystander.[6] And although counsel was appointed by the court to represent him, petitioner's intent to remain a full partner in his defense was clear from the record, and in some respects was recognized by the trial court. Petitioner filed a number of pro se pretrial motions indicating his intent to participate and to further his ability to participate in his own defense.[7] The trial court ruled upon the merits of some of these motions, and others were apparently ignored. Petitioner also co-signed several motions with his

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[6]At his first court appearance petitioner personally moved for authority to contact witnesses (SR II 2) and at his next appearance he moved the court for medical attention, because of beatings he had received at the hand of jailers, and he renewed his motion to contact potential witnesses by telephone (SR III 3).

[7]On April 8, 1976, petitioner filed a Motion to Grant State Remedy or Return Property, relating to the seizure of property and legal materials from his cell (R I 33-40) and he filed a Motion to Grant Access to Materials to Aid in his Defense (R I 41-42). These motions were apparently never heard or ruled upon. On May 10, 1976 petitioner filed four pro se motions: Motion to Compel Court Appointed Attorney to File this Defendant's Pro Se Motions (R I 63-65); Motion to Produce Grand Jury Testimony (R I 66-68); Motion for Use of Law Library (R I 69-71); Motion for Disqualification of Trial Judge (R I 72-74). These four motions were all ruled upon and denied by the trial court, although no hearing was held even after petitioner's express request for such a hearing (R I 76; R VIII 324-325, 329). Petitioner also filed a pro se Motion to Suppress Evidence on May 11, 1976 (R I 82-83) and a Motion to Allow this Defendant to Give First Phase of Closing ARgument to the jury on May 17, 1976 (R I 102); this latter motion was denied without a hearing (R VIII 357).

appointed counsel.[8] The record was evident that petitioner did not intend to merely be a bystander to his own defense. However, there came to be a disagreement between petitioner and appointed counsel regarding how his defense should be conducted.[9] This disagreement culminated in petitioner's pro se motions. There was no hearing nor inquiry of petitioner regarding this motion or the disagreements with counsel over the conduct of the defense. There was however an unreported conference in chambers between the court and counsel, for which petitioner was not present, where some of the questions may have been resolved (R VIII 325). The trial proceeded and petitioner subsequently moved the court to allow him to present closing argument.

A primary question in this case is whether from the silent record, petitioner can validly be held to have knowingly and intelligently waived his Sixth Amendment "right to defend himself" Faretta v. California, 422 U.S. 806, 836 (1975). It is a significant constitutional question that has not yet been resolved by this Court. It is settled, however, regarding other fundamental rights that a waiver of those rights requires some form of hearing to determine on the record whether the waiver was understanding and voluntary. E.g. Johnson v. Zerbst,

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[8] On March 11, 1976 four motions were filed that were signed by petitioner and counsel: Motion for Medical Service (R I 8-9); Motion for Protective Order (R I 10-11). Motion for Defendant to Contact Certain Witnesses by Telephone (R I 12); Motion for Authority to Take Depositions, Issue Subpoenas and Employ Investigator (R I 13-14). Two cosigned motions were filed on April 7, 1976: Motion to allow Defendant Visitation and Uncensored Communication with Co-defendants (R I 31-32); Motion for Appointment of Attorney to Represent Defendant in Matters Concerning Children (R I 29-30).

[9] The disagreement was brought to the trial court by way of petitioner's pro se "Motion to Compel Court Appointed Attorney to File this Defendant's Pro Se Motions (Pre-Trial)". The motion alleged that appointed counsel had failed to file a number of motions prepared by petitioner, that these motions were "imperative to my defense" and "deserve to be heard in open court." (R I 65), and that the motions were prepared as a "needed measure" and "in concern for his defense," (R I 64). When the motion was brought up in court, the judge asked appointed counsel if he had filed the motions and counsel responded: "We filed, I think, all of them, Judge" (R VIII 325). No further hearing or inquiry were conducted and petitioner was not consulted by the court.

304 U.S. 458 (1938); Douglas v. Alabama , 380 U.S. 415, 422 (1965); Boykin v. Alabama, 395 U.S. 238 (1969).

This is not a case where the record is silent as to petitioner's desire to personally participate in his own defense. The record is quite to the contrary. Thus the situation presented here is not one where the Court is asked to rule that a defendant must be informed of the right to represent himself and must waive that right in a manner equivalent to the concomitant right to counsel. Rather this case presents a situation where petitioner made fully clear his intent to take an active role in his defense and by that action made clear the limited nature of his acceptance of the assistance of counsel. A disagreement between petitioner and appointed counsel arose over the conduct of the defense wherein petitioner informed the court of the fact that counsel refused to honor his suggestions which resulted in impairment of his defense. See Faretta v. California, supra, 422 U.S. at 836 n. 1 (Burger C.J. dissenting). Under such circumstances it was incumbent upon the trial court, consistent with due process, to conduct a hearing and make inquiry of petitioner regarding his right to defend himself.

It was established in Faretta v. California, supra, that the right to defend oneself is a personal right fully embodied in the Sixth and Fourteenth Amendments. Where a fundamental right is involved, for a waiver to be valid the record must affirmatively demonstrate that it was knowing and voluntary. E.g. Johnson v. Zerbst, supra. Thus where for example the fundamental right to counsel is involved a waiver of that right cannot be presumed from a silent record. E.g. Carnley v. Cochran, 369 U.S. 506, 516 (1962). A like standard must be applied in the present situation. Since the right to defend oneself is a correlative right to the right to the assistance of counsel, it may not be constitutionally necessary to separately inform an accused of his right of self-representation. However, where it shows on the record that petitioner sought to take an active role in his own defense and that a disagreement between petitioner and counsel over the conduct of the defense had arisen, the procedural due process protections for the waiver

of a fundamental right must be followed.

The situation is in many respects similar to that resolved by this Court in Glasser v. United States, 315 U.S. 60 (1941) and Holloway v. Arkansas, 435 U.S. 475 (1978). Those cases involved questions of effective assistance of counsel where a single attorney represents multiple defendants. In both decisions it was recognized that where there is some objection on the record to the multiple representation, then it is incumbent upon the trial court to inquire into the matter and determine whether the right to independent counsel had been voluntarily waived. Thus, in Glasser v. United States, supra, it was held that since "Glasser never affirmatively waived the objection he had initially advanced" a waiver of the right to independent counsel could not be found from his "tacit acquiesence" and could not be upheld on such a silent record. 315 U.S. at 70. This is so because:

> "Upon the trial judge rests the duty of seeing that the trial is conducted with solicitude for the essential rights of the accused."

Id. at 71. And, quoting from Johnson v. Zerbst, supra, this Court added:

> 'This protecting duty imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused. While an accused may waive the right to counsel, whether there is a proper waiver should be clearly determined by the trial court, and it would be fitting and appropriate for that determination to appear upon the record.'

315 U.S. at 71. In Holloway v. Arkansas, supra, it was reaffirmed that where there is an objection and no voluntary waiver on the record, no waiver of the right to independent counsel can be found and "automatic" reversal is required. 435 U.S. at 484, 488.

The situation faced in Glasser and Holloway are analogous to that of the present case. The constitutional implications are the same. Both situations involve fundamental Sixth Amendment rights. As in Holloway and Glasser, action by the trial court is triggered by an objection. If there is an

objection interposed the trial court must hold a hearing on the record to determine whether the defendant voluntarily and intelligently waives his fundamental right.

Therefore, while the trial court may not in the first instance have been required to inquire into petitioner's waiver of the right of self-representation, once the disagreement between counsel over the conduct of the defense became apparent, it was the trial court's duty to inquire into petitioner's desire to exercise his "right to defend himself." As emphasized by Faretta v. California, supra, the right to defend oneself is an important personal right guaranteed by the Sixth and Fourteenth Amendments. The procedure of requiring an on the record hearing into the voluntariness of a waiver of that right if an objection is raised, is necessary in order to give full effect to the right recognized by Faretta. As this Court reasoned in Faretta the Sixth Amendment counsel provision ...

> "... speaks of the 'assistance' of counsel, and an assistant, however expert, is still an assistant. The language and spirit of the Sixth Amendment contemplate that counsel, like other defense tools guaranteed by the Amendment shall be an aid to a willing defendant -- not an organ of the State interposed between an unwilling defendant and his right to defend himself personally. To thrust counsel upon the accused ... [would strip] the right to make a defense ... of the personal character upon which the Amendment insists."

422 U.S. at 820.

Petitioner here sought from the outset of the proceedings to take an active role in all aspects of his own defense. His intent was clearly on the record not to be a mere bystander. Petitioner brought to the attention of the trial court a disagreement with his counsel the nature of which indicated that counsel had disagreed over the conduct of petitioner's defense and in a manner which petitioner believed impaired his defense. At this point the trial court should have inquired regarding petitioner's fundamental "right to defend himself." Absent such an inquiry after an objection to counsel had been advanced, a free, knowing waiver cannot be presumed. However, there was no inquiry by the court, there was no hearing and there were no findings by the trial court.

The Supreme Court of Florida was directly presented with the federal question in the following point on appeal:

VII

APPELLANT'S PERSONAL RIGHT TO PARTICIPATE FULL IN HIS OWN DEFENSE WAS UNCONSTITUTIONALLY RESTRICTED BY THE TRIAL COURT.

The question was fully briefed both as to the denial of a hearing as to petitioner's right to defend himself and as to the denial of requests made by petitioner to enable him to more fully participate in his own defense. The opinion of the Supreme Court of Florida did not address this issue except sub silentio by its affirmance. The issue was again unsuccessfuly raised by petitioner in his motion for rehearing. The federal question was thus fully presented to the Supreme Court of Florida.

This Court should accept jurisdiction to decide the standards for waiver of the fundamental Sixth and Fourteenth Amendment right of self-representation.

IV

THIS COURT SHOULD GRANT CERTIORARI TO DECIDE WHETHER, CONSISTENT WITH THE EIGHTH AND FOURTEENTH AMENDMENT REQUIREMENTS IN A CAPITAL CASE, THE HARMLESS ERROR TEST PROMULGATED IN UNITED STATES V. AGURS, 427 U.S. 97 (1976) MAY BE EMPLOYED WHERE THE PROSECUTION FAILS TO DISCLOSE MATERIAL EVIDENCE WITHIN ITS CONTROL RELEVANT TO THE CREDIBILITY OF A KEY PROSECUTION WITNESS WHOSE TESTIMONY IS THE SOLE BASIS FOR ESTABLISHING MOTIVE AND A PARTICULAR AGGRAVATING FACTOR RELIED UPON BY THE SENTENCING JUDGE IN IMPOSING THE DEATH PENALTY.

In the present case on the day the trial began the prosecution disclosed that they would be calling among others, Ellis Marlow Haskew as a witness. Based on the lateness of the disclosure, petitioner renewed his motion for continuance in order to depose the witnesses so recently revealed. The motions were denied. Petitioner's attorney was permitted to speak with Mr. Haskew for only thirty minutes, just prior to his actual testimony. After speaking with Mr. Haskew, petitioner moved alternatively to be given a continuance to investigate matters brought up in Haskew's proposed testimony or to exclude Haskew's testimony altogether. Again the motion was denied.

Haskew claimed to have been at a party with petitioner and five other persons. He further testified that petitioner told him that he was a parole violator and a fugitive for several years and had no intention of returning to prison. He further claimed that petitioner had talked about the operation of the Taser gun and had tried to sell him guns and teflon coated bullets which leave no ballistics. Haskew also testified that petitioner told him that he carried several guns with him at all times.

The significance of Haskew's testimony is apparent. The prosecutor in closing argument described it as "important" and the sentencing judge relied on it as the sole basis for his finding of the aggravating circumstance of "avoid arrest" [921.141 (5) (e), Fla. Stat.]. Petitioner requested time to interview those other persons allegedly at the party and to investigate Haskew's background, credibility, and possible motives

for testifying. Petitioner informed the Court he needed time to locate a witness who would testify he was somewhere else that night.

The issues surrounding the testimony of Ellis Marlowe Haskew were raised on direct appeal in the Supreme Court of Florida which held:

> "[The trial court] found no prejudicial violation for the late giving of this witness's name. At most, any violation by the state was trivial, as was the testimony of Haskew. This is the significant difference between the instant case and Antone v. State, 355 So.2d 777 (Fla. 1978), conviction aff'd on later appeal, 382 So.2d 1205 (Fla.), cert. denied, ___U.S.___, 101 S.Ct. 287 66 L.Ed.2d 141 (1980), in which a major thrust of state's case was based on Haskew's testimony. Likewise, any alleged failure by the state to disclose that Haskew's attorneys' fees were being paid by the Florida Department of Criminal Law Enforcement was harmless. Under the test in United States v. Agurs, 427 U.S. 97, 96 S. Ct. 2392, 49 L.Ed.2d 342 (1976), no new trial is required."

403 So.2d at 360.

This Court has repeatedly recognized that since death is a different kind of punishment from any other a state may impose it carries with it a greater need for reliability in the procedures leading to its imposition, both at the guilt or innocence and penalty stages. See Beck v. Alabama, 447 U.S. 625, 637-638 (1980); Lockett v. Ohio, 438 U.S. 586, 604-605 (1978); Gardner v. Florida, 430 U.S. 349, 357-358 (1977). A judgment of conviction or sentence of death cannot be constitutionally imposed, consistent with the above principles, where they were obtained through the use of testimony which could have been substantially impeached or completely contradicted.

The only impeachment evidence brought out was that Haskew had been previously convicted of four or five felonies. The total cross-examination consisted of only two pages. Adequate time to investigate would have revealed that the state knew of Ellis Marlow Haskew months before this trial. Haskew was taken into custody by Florida Department of Criminal Law Enforcement (FDCLE) officials on February 25, 1976. It is now known for example that Haskew's attorney's fees were being paid

by the FDCLE over a three month period beginning in early March, 1976, which period would include the time of trial in the instant case. See United States v. Diecidue, 448 F. Supp. 1011 (MD. Fla. 1978). In Diecidue the defendants had adequate opportunities to investigate Haskew and the district court there summarized the substantial impeachment of Haskew covering more than 350 pages of cross-examination. Id.

In United States v. Agurs, supra, this Court held that a new trial was required where evidence was undisclosed to the defense only if the omitted evidence created a reasonable doubt that did not otherwise exist. In Agurs this Court noted that the undisclosed evidence did not contradict any evidence offered by the prosecutor and was largely cumulative. By no stretch of the imagination can the undisclosed evidence be so characterized in the instant case. Indeed it can fairly be said that petitioner's conviction and death sentence were based in substantial part on Haskew's testimony left virtually unimpeached and uncontradicted. This Court should grant certiorari to decide the important constitutional question of whether, consistent with the Eighth and Fourteenth Amendment requirements in a capital case, the harmless error test promulgated in United States v. Agurs may be employed where the prosection fails to disclose material evidence within its control relevant to the credibility of a key prosecution witness whose testimony is the sole basis for establishing motive and a particular aggravating factor relied upon by the sentencing judge in imposing the death penalty.

CONCLUSION

Petitioner prays that the petition for writ of certiorari to the Supreme Court of Florida be issued.

Respectfully submitted,

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BY _____
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Counsel for Petitioner

APPENDIX

Jessie Joseph TAFERO, Appellant,

v.

STATE of Florida, Appellee.

No. 49535.

Supreme Court of Florida.

June 11, 1981.

Rehearing Denied Sept. 29, 1981.

Defendant was convicted before the Circuit Court, Broward County, M. Daniel

Futch, J., of robbery, kidnapping and two counts of first-degree murder and was sentenced to death for the murder offenses, and he appealed. The Supreme Court held that: (1) evidence was sufficient to sustain convictions, (2) defendant was not denied fair trial due to widespread publicity of deaths of the victims, who were police officers, and the fact that nearly every juror had heard of the incidents; (3) defendant was not denied fair trial due to alleged insufficient peremptory challenges, flying of courthouse flag at half-mast in memory of deceased police officers and local speeches in which Attorney General referred to the "turnpike murders" during the trial; (4) permitting state witness to testify, though his name was not supplied to defense counsel until the start of the trial, was not reversible error; (5) State did not err in proceeding under dual theory of felony-murder and premeditated murder; (6) mere fact that trial judge had been a highway patrol officer in distant past did not support a claim of bias or prejudice on judge's part so as to warrant his disqualification; and (7) defendant's death sentences were justified and were not invalidated due to fact that his coparticipant received life sentences on his pleas to second-degree murder and kidnapping.

Convictions and sentences affirmed; motion for leave to file extraordinary motion for new trial denied.

1. Homicide ⇐253(1)
Kidnapping ⇐5
Robbery ⇐24.1(1)

Evidence, including eyewitness testimony and evidence that bullets removed from victims matched gun in defendant's possession, was sufficient to sustain his convictions of robbery, kidnapping and two counts of first-degree murder.

2. Criminal Law ⇐633(1)

Defendant, who was convicted of robbery, kidnapping and two counts of first-degree murder, was not denied a fair trial due to fact that police officers assertedly taunted and physically assaulted defendant while he was in jail, in light of fact that trial judge took action to correct any mistreatment and it did not appear that any mistreatment affected the trial itself.

3. Criminal Law ⇐633(1)

Defendant, who was convicted of robbery, kidnapping and first-degree murder of two police officers, was not denied fair trial due to widespread publicity of the deaths and fact that nearly every juror had heard of the incidents, in light of fact that jurors were admonished not to discuss the case, not to listen to television or radio accounts and not to read any newspaper articles about the trial and that it did not appear that jurors had violated their oath that they would decide the case on the merits from the evidence presented in open court. U.S.C.A.Const. Amend. 6.

4. Criminal Law ⇐633(1)
Jury ⇐136(4)

Defendant, who was convicted of robbery, kidnapping and first-degree murder of two police officers, was not denied a fair trial due to alleged insufficient peremptory challenges, flying of courthouse flag at half-mast in memory of the officers and local speeches in which Attorney General referred to the "turnpike murders" during the trial.

5. Criminal Law ⇐1166(11)

In proceeding in which defendant was convicted of robbery, kidnapping and first-degree murder of two police officers and in which witness testified that a few weeks prior to the shootings defendant had told witness that defendant would never go back to prison and that he had a Taser gun and some armor-piercing ammunition, permitting such witness to testify, though prosecutor did not supply witness' name to defense counsel until the start of the trial shortly after it was learned that the witness could help the prosecution, was not reversible error.

6. Criminal Law ⇐1171.1(1)

Alleged failure by State to disclose, in criminal proceeding, that a state witness' attorney fees were being paid by Depart-

ment of Criminal Law Enforcement was not prejudicial.

7. Criminal Law ⇐342, 348

In proceeding in which defendant was convicted of robbery, kidnapping and first-degree murder of two police officers, admission of evidence that defendant was on parole and was in possession of Taser gun and armor-piercing ammunition was not error, in light of fact that such evidence was relevant to show that defendant had reason to kill any police officer who stood in defendant's way and to show that he participated in the shooting and that such evidence did not become a feature of the trial.

8. Criminal Law ⇐338(7)

Relevant evidence is inadmissible if its probative value is substantially outweighed by danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence.

9. Criminal Law ⇐29

In proceeding in which defendant was convicted of robbery, kidnapping and first-degree murder of two police officers, State did not err in proceeding under dual theory of felony-murder and premeditated murder.

10. Judges ⇐51(3)

Test of sufficiency of affidavit for disqualification of judge for prejudice in a criminal proceeding is whether or not the sworn statement shows that movant has well-grounded fear of not receiving a fair trial at hands of the judge; facts and reasons given in the sworn affidavit must tend to show personal bias or prejudice.

11. Judges ⇐49(1)

Rule relating to disqualification of judge for prejudice in criminal proceeding is not intended as a vehicle to oust a judge who has made adverse pretrial rulings.

12. Judges ⇐49(1)

In proceeding in which defendant was convicted of robbery, kidnapping and first-degree murder of two police officers, mere fact that trial judge had been a highway patrol officer in the distant past did not support a claim of bias or prejudice on judge's part so as to warrant his disqualification.

13. Witnesses ⇐283

Denial of defense's request to recall two state witnesses was not error in criminal proceeding.

14. Criminal Law ⇐656

Denial of defendant's request to take polygraph examination was not error in criminal proceeding.

15. Jury ⇐125

Exclusion of a venireman was not error in criminal proceeding.

16. Criminal Law ⇐200(1)

In proceeding in which defendant was convicted of robbery, kidnapping and two counts of first-degree murder, defendant's conviction of robbery did not constitute double jeopardy, in light of fact that, due to clear evidence of premeditation, it was not necessary to convict defendant of robbery in order to support the murder conviction. U.S.C.A.Const. Amend. 5.

17. Criminal Law ⇐700

In proceeding in which defendant was convicted of two counts of first-degree murder and was sentenced to death, State's failure to inform defendant, prior to trial, as to the specific aggravating circumstances which State intended to prove was not error.

18. Homicide ⇐127

In proceeding in which defendant was convicted of two counts of first-degree murder and was sentenced to death, trial court had not been deprived of jurisdiction to impose death sentence because indictment failed to allege any aggravating circumstances.

19. Homicide ⇐354

In proceeding in which defendant was convicted of two counts of first-degree murder and was sentenced to death, evidence did not support findings that the deaths were heinous, atrocious or cruel and that defendant had created a great risk of death to many persons.

20. Homicide ⇐354

Imposition of death sentence for first-degree murders of police officers by defendant, who committed the offenses while he was on parole and a fugitive from justice, who had significant history of prior criminal activity involving use or threat of violence, who committed the offenses to avoid or prevent arrest or effect escape from custody and to hinder enforcement of the laws and in regard to whom there were no mitigating circumstances, was justified, fact that defendant's coparticipant received life sentences on his pleas to second-degree murder and kidnapping did not invalidate defendant's death sentences, in light of fact that defendant did the shooting and probably was the leader.

21. Criminal Law ⇐986.1

In proceeding in which defendant was convicted of two counts of first-degree murder and other offenses and was sentenced to death, trial judge's failure to inquire into defendant's waiver of his right to present evidence at sentencing phase of the trial was not error, absent any indication that defendant did not know or understand his right.

22. Criminal Law ⇐1206(1)

Death sentence statute provides sufficient standard for weighing the aggravating and mitigating circumstances and the statute is otherwise constitutional.

23. Criminal Law ⇐997.14

Defendant, who had been convicted of robbery, kidnapping and two counts of first-degree murder, would not be granted leave to file extraordinary motion for new trial in nature of petition for writ of error coram nobis.

Richard L. Jorandby, Public Defender, Craig S. Barnard, Chief Asst. Public Defender, and Jerry L. Schwartz, Richard B. Greene and Jack A. Goldberger, Asst. Public Defenders, West Palm Beach, for appellant.

Jim Smith, Atty. Gen., and Raymond L. Marky, Asst. Atty. Gen., Tallahassee, Benedict P. Kuehne, Basil S. Diamond and Paul H. Zacks, Asst. Attys. Gen., West Palm Beach, and Michael J. Satz, State Atty., and Linda DeBene, Asst. State Atty., Fort Lauderdale, for appellee.

PER CURIAM.

Tafero was convicted of two counts of first-degree murder and one count each of robbery and kidnapping and received two death sentences and two prison terms. He appeals these convictions and the attendant sentences. We have jurisdiction. Art. V, § 3(b)(1), Fla.Const. We affirm.

In the early morning of February 20, 1976, Trooper Phillip Black and Donald Irwin approached a Camaro parked at a rest stop on Interstate 95. Asleep in the driver's seat sat Walter Rhodes; at his side was Jennie Tafero. In the back seat sat Sonia Jacobs and her two children. As Black looked into the car, he noticed a gun at Rhodes' feet, ordered Rhodes out of the car, and ran a radio check on Rhodes and the gun. Eventually Black ordered Tafero out of the car, and, as Tafero exited through the driver's door, he and Black began to scuffle.

Eyewitness accounts vary as to what occurred next. A truck driver who was stopped at the rest area testified that Rhodes stood with his hands in the air while Irwin grabbed Tafero and held him against the patrol car. The witness then heard a single shot and a cry from the trooper, "I'm shot." Several rapid shots followed, and both the trooper and Irwin fell to the ground. The witness concluded that the shots came from the back seat of the Camaro.

A second eyewitness, another truck driver, also testified that Tafero and Black struggled, but added that Black pulled a gun on Tafero and Rhodes. While passing the Camaro on his way out of the rest area, the driver noticed Jacobs in the back seat. He then heard several shots and saw both Black and Irwin fall.

A third eyewitness was co-indictee Rhodes. Rhodes testified that when Black took

the gun from the Camaro, Tafero passed another gun to Jacobs in the back seat. Black ordered everyone out of the car and, as Black assisted Tafero from the car, the two began to scuffle. Rhodes, with his back to the scuffle, then heard two shots which sounded as if they were fired from different guns. He turned and saw Jacobs holding a gun which Tafero then grabbed and fired at Black and Irwin, who fell to the ground. All three eyewitnesses agree that Rhodes, Tafero, Jacobs, and Jacobs' children fled in Black's patrol car. Later, the group commandeered another car and took its owner hostage. They were finally apprehended at a police roadblock.

[1] Tafero challenges the sufficiency of the evidence to convict him of murder, but the evidence against him is overwhelming. In addition to the eyewitness testimony, bullets removed from the victims match the gun in Tafero's possession at his arrest. We do not accept Tafero's contention that Rhodes' testimony was unbelievable in that Rhodes actually did the shooting. Rhodes' testimony is corroborated by both the physical evidence and the other eyewitnesses' testimony. Additionally, both truck drivers noticed Rhodes' hands in the air when the first shots were fired. The evidence shows beyond a reasonable doubt that Tafero is guilty of the premeditated murder of both Irwin and Black.

Similarly, we conclude from our review of the record that the state presented sufficient evidence to support Tafero's kidnapping and robbery convictions.

[2] We next consider alleged trial procedure violations. The appellant contends that he was deprived of a fair trial by what he describes as an inherently prejudicial atmosphere surrounding the proceedings. He claims that while in jail police officers taunted and physically assaulted him. The trial judge took action to correct any mistreatment, and there appears to be no way that such conduct, if it occurred, affected the trial itself.

[3] Tafero also complains of widespread publicity of the deaths and the fact that nearly every juror had heard something of the incidents. The trial judge carefully inquired into the prospective jurors' prior knowledge of the case and precisely instructed the jurors to avoid any outside influence. Although he did not sequester the jury, he admonished them not to discuss the case, not to listen to television or radio accounts, and not to read any newspaper articles about the trial.

The United States Supreme Court discussed the impact of pretrial publicity on a defendant's constitutional right of fairness in *Murphy v. Florida*, 421 U.S. 794, 95 S.Ct. 2031, 44 L.Ed.2d 589 (1975), where the Court stated:

> The constitutional standard of fairness requires that a defendant have "a panel of impartial, 'indifferent' jurors." Qualified jurors need not, however, be totally ignorant of the facts and issues involved.
>
> "To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court."
>
> At the same time, the juror's assurances that he is equal to this task cannot be dispositive of the accused's rights, and it remains open to the defendant to demonstrate "the actual existence of such an opinion in the mind of the juror as will raise the presumption of partiality."

Id. at 799-800, 95 S.Ct. at 2036 (citations omitted).[1]

Neither the voir dire of the prospective jurors nor any other portion of the trial reflects that those selected to try this case

1. Chief Justice Burger would have reversed had the Court been exercising its supervisory power over the federal courts. He agreed with the majority, however, that the due process clause does not require reversal of that state prosecution. 421 U.S. at 803, 95 S.Ct. at 2037 (Burger, C.J., concurring).

were not impartial or unable to lay aside any impressions or opinions which may have resulted from pretrial publicity. The jurors vowed that they could and would decide the case on the merits from the evidence presented in open court. We are unable to discern that they violated this oath in any way.

[4] Tafero contends that the general tenor of the proceedings precluded a fair trial. He complains of insufficient peremptory challenges, the flying of the courthouse flag at half-mast in memory of deceased police officers, and speeches made locally by the attorney general during the trial referring to the "turnpike murders." These circumstances do not appear to have affected the trial and are far from inherently prejudicial. Utilizing the test espoused in *Sheppard v. Maxwell*, 384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed.2d 600 (1966), we find no reasonable likelihood that the matters described affected this trial. No irregularity at trial affected or changed the facts, prevented any party from presenting facts, or prevented the jury from impartially considering the facts. Tafero has failed to prove the existence of any prejudicial influence, and under the circumstances there was no constitutional unfairness. *See Dobbert v. Florida*, 432 U.S. 282, 97 S.Ct. 2290, 53 L.Ed.2d 344 (1977).

We now turn to the testimony of Ellis Marlowe Haskew. Haskew is no stranger to the witness stands of this state.[3] At the start of the trial, shortly after learning that Haskew could help the prosecution, the prosecutor supplied Haskew's name to defense counsel. The trial court denied defense's motion for continuance. Four days later, on the morning of Haskew's testimony, defense counsel interviewed Haskew. The trial court denied a second motion for continuance which was based on Tafero's desire to further investigate the truthfulness of Haskew's story.

Haskew's testimony was brief. In essence, he stated that a few weeks prior to the shootings Tafero told him that he would never go back to prison. Haskew also said Tafero told him about a Taser gun and some armor-piercing ammunition that he had; such a gun and ammunition were used at the rest stop.

[5, 6] The trial judge permitted Haskew to testify only after a *Richardson* inquiry.[5] He found no prejudicial violation for the late giving of this witness's name. At most, any violation by the state was trivial, as was the testimony of Haskew. This is the significant difference between the instant case and *Antone v. State*, 356 So.2d 777 (Fla.1978), *conviction aff'd. on later appeal*, 382 So.2d 1205 (Fla.), *cert. denied*, — U.S. —, 101 S.Ct. 287, 66 L.Ed.2d 141 (1980), in which a major thrust of the state's case was based on Haskew's testimony. Likewise, any alleged failure by the state to disclose that Haskew's attorney's fees were being paid by the Florida Department of Criminal Law Enforcement was harmless. Under the test in *United States v. Agurs*, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976), no new trial is required.

[7, 8] Tafero claims error in the admission of the fact he was on parole, the discussion of the Taser gun, and other items. He claims this evidence had no relevance to the charges against him, and, even if relevant, the volume of the evidence amounted to "prosecutorial overkill." We disagree. Some of this evidence was relevant to show that Tafero had a reason to kill any police officer who stood in his way, some of it was relevant to show that he participated in the shooting, and this evidence did not become a feature of the trial. The primary test for admissibility is relevance.[6] *Ruffin v. State*, 397 So.2d 277 (Fla.1981).

3. *See, e.g., United States v. Dworkin*, 448 F.Supp. 1011 (M.D.Fla.1978); *Antone v. State*, 382 So.2d 1205 (Fla.), *cert. denied*, — U.S. —, 101 S.Ct. 287, 66 L.Ed.2d 141 (1980).

5. *Richardson v. State*, 246 So.2d 771 (Fla.1971).

6. §§ 90.402 and 90.403, Fla.Stat. (1979), *not applicable to this trial*, hold that all relevant evidence is admissible except as provided by law. It is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative

[9] The appellant protests the state's proceeding under the dual theory of felony murder and premeditated murder. Although this issue was settled in *Knight v. State*, 338 So.2d 201 (Fla.1976), the appellant attempts to distinguish that holding because here two other people were indicted for the same crimes. We fail to find this to be a valid distinction. Tafero had sufficient notice of the charges against him. Proceeding on a felony-murder theory might have been superfluous because the facts clearly demonstrated premeditation. Nevertheless, by the evidence the jury could have found that the homicides were committed for the purpose of forcefully taking the trooper's car to make an escape. There was no error in proceeding under both theories.

[10, 11] Tafero also feels that the trial judge, an ex-highway patrolman, should have recused himself. He urges that the test for recusal is the accused's fear of unfairness, not whether the judge is actually capable of conducting a fair trial. The test of the sufficiency of an affidavit for disqualification for prejudice is whether or not the sworn statement shows that the movant has a well-grounded fear of not receiving a fair trial at the hands of the presiding judge. *State ex rel. Brown v. Dewell*, 131 Fla. 566, 179 So. 695 (1938). The facts and reasons given in the sworn affidavit must tend to show personal bias or prejudice. This rule is not intended as a vehicle to oust a judge who has made adverse pretrial rulings. *Suarez v. State*, 95 Fla. 42, 115 So. 519 (1928).

[12] No personal bias or prejudice had been demonstrated in this case. The mere fact that Judge Futch was, in the distant past, a highway patrol officer does not support a claim of bias or prejudice on the judge's part. Tafero presented nothing to warrant the judge's disqualification. *See United States v. Archbold-Newball*, 554 F.2d 665 (5th Cir.), *cert. denied*, 434 U.S. 1008, 98 S.Ct. 644, 54 L.Ed.2d 496 (1977).

evidence: The evidence challenged here passes that test.

[13–15] Other claimed errors are an alleged abuse of discretion in denying the defense's request to recall two state witnesses, the refusal of the defendant's request to take a polygraph examination, and the exclusion of one venireman. Each of these claims has been examined, and, in the context in which each arose, the trial judge did not err.

[16] Tafero claims that his conviction of robbery constitutes double jeopardy. The jury was charged that they could convict Tafero of murder by premeditation or under the felony-murder concept, the felony being the robbery of Trooper Black.

In *State v. Pinder*, 375 So.2d 836 (Fla. 1979), this Court held that

> where premeditated murder is charged, but the only evidence to sustain the murder conviction is furnished by proof that the killing occurred as the result of one of the felonies enumerated in section 782.04(1), we hold that the defendant may not be convicted and punished for both the felony murder and the underlying felony.

Id. at 839. *Pinder* is not applicable because in this case there is clear evidence of premeditation, and it was not necessary to convict Tafero of robbery in order to support the murder conviction.

[17, 18] We now turn to the death sentence. Tafero first claims that the state failed to tell him, prior to trial, the specific aggravating circumstances it intended to prove. Such contention is not new and has been previously disposed of adversely to the appellant. *See Menendez v. State*, 368 So.2d 1278 (Fla.1979); *Spinkellink v. Wainwright*, 578 F.2d 582 (5th Cir. 1978), *cert. denied*, 440 U.S. 976, 99 S.Ct. 1548, 59 L.Ed.2d 796 (1979). Similarly, his second contention is that the trial court had no jurisdiction to impose a death sentence because the indictment failed to allege any aggravating circumstances. This claim is likewise without merit.

[19] Tafero contends that the trial judge should not have found the deaths to

be heinous, atrocious, or cruel. Absent some circumstances over and above what happened in this instance, the facts do not justify this particular finding. *State v. Dixon*, 283 So.2d 1 (Fla.1973), *cert. denied*, 416 U.S. 943, 94 S.Ct. 1951, 40 L.Ed.2d 295 (1974). *See Kampff v. State*, 371 So.2d 1007 (Fla.1979); *Menendez v. State*; *Riley v. State*, 366 So.2d 19 (Fla.1978); *Cooper v. State*, 336 So.2d 1133 (Fla.1976), *cert. denied*, 431 U.S. 925, 97 S.Ct. 2200, 53 L.Ed.2d 239 (1977).

The trial judge also found that Tafero created a great risk of death to many persons. The record does not support that finding. Under the facts of this case, attempting to run a roadblock and being stopped by police gunfire does not constitute "great risk" to "many persons" as we defined those terms in *Kampff*.

[20] The trial judge found other aggravating factors, all of which are justified. They are:

1. Both murders were committed by the Defendant while he was on parole and while he was actually a fugitive from justice.

2. The Defendant does have a significant history of prior criminal activity involving the use or threat of violence to the person of another. The Defendant was convicted of the crime of Assault with Intent to Commit Rape on December 28th, 1967 in Dade County, Florida and was sentenced to five years in State Prison. The Defendant was convicted of the crime of Crime Against Nature in Case # 67-5285A in Dade County on December 28th, 1967 and was sentenced to five years imprisonment to be served consecutively with Case # 67 5284A. In Case # 67-5284A, the Defendant, JESSIE JOSEPH TAFERO, was found guilty of Breaking and Entering an Apartment Dwelling and Assaulting Persons Lawfully Therein, and he was sentenced to five years imprisonment on December 28th, 1967.

* * * * * *

4. The Murders were committed by MR. TAFERO for the purpose of avoiding or preventing lawful arrest or effecting an escape from custody. Evidence presented to this Court indicated beyond any reasonable doubt that MR. TAFERO was on parole and he had indicated to his friends that he would never again go back to prison and that this desire to avoid any future imprisonment was one of the reasons that MR. TAFERO was personally armed with an automatic pistol on most occasions.

5. The Murders were committed to hinder the lawful enforcement of the laws of this State. The victims of these murders, two law enforcement officers, were attempting to enforce the laws of this State after discovering various firearms and various types of drugs and controlled substances in the automobile in which the Defendant was a passenger.

The trial judge also found no mitigating circumstances. The fact that Rhodes received life sentences upon his pleas to second-degree murder and kidnapping does not invalidate Tafero's death sentences in this case in which Tafero did the shooting and probably was the leader of the group. Although the trial court erroneously found two aggravating factors, it properly found four aggravating factors. Because there were no mitigating circumstances, the sentence will not be disturbed. *See Elledge v. State*, 346 So.2d 998 (Fla.1977).

[21, 22] We find no error in the trial judge's failure to inquire into Tafero's waiving his right to present evidence at the sentencing phase of the trial. There is no indication that Tafero did not know or understand his right. Tafero claims the penalty assessed him was disproportionate to the offense. We believe otherwise. Further, we reiterate that the death statute provides a sufficient standard for weighing the aggravating and mitigating circumstances and that the statute is otherwise constitutional. *See Proffitt v. Florida*, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976); *Songer v. State*, 365 So.2d 696 (Fla. 1978), *cert. denied*, 441 U.S. 956, 99 S.Ct. 2185, 60 L.Ed.2d 1060 (1979); *State v. Dix-*

on. The statute was not unconstitutionally applied in this case.

The convictions and sentences are affirmed.

[23] We have also considered the appellant's motion for leave to file an extraordinary motion for new trial in the nature of a petition for writ of error coram nobis. That motion is denied.

It is so ordered.

SUNDBERG, C. J., and ADKINS, BOYD, OVERTON, ENGLAND, ALDERMAN and McDONALD, JJ., concur.

Appendix B

Supreme Court of Florida

TUESDAY, SEPTEMBER 29, 1981

JESSIE JOSEPH TAFERO,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. 49,535

Circuit Court No. 76-1275-CF-A
(Broward)

Upon consideration of the Motion for Rehearing filed in the above styled cause by the attorney for Appellant, and response thereto,

IT IS ORDERED that said Motion be and the same is hereby denied, and it is further

ORDERED that the Application for Stay of Judgment and Mandate filed by attorney for Appellant is granted and proceedings in this Court and in the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida, are hereby stayed to and including October 29, 1981, to allow Appellant to seek review in the Supreme Court of the United States and obtain any further stay from that Court.

A True Copy

TEST:

Sid J. White
Clerk, Supreme Court

By: Daryn Carver
Deputy Clerk

TC
cc: Hon. Robert E. Lockwood, Clerk
Hon. M. Daniel Futch, Judge

Craig S. Barnard, Esquire
Joy Shearer, Esquire

Appendix C

921.141 Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence.—

(1) SEPARATE PROCEEDINGS ON ISSUE OF PENALTY.—Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by s. 775.082. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If, through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge may summon a special juror or jurors as provided in chapter 913 to determine the issue of the imposition of the penalty. If the trial jury has been waived, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose, unless waived by the defendant. In the proceeding, evidence may be presented as to any matter that the court deems relevant to sentence, and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (5) and (6). Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the constitutions of the United States or of the State of Florida. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

(2) ADVISORY SENTENCE BY THE JURY.—After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:

(a) Whether sufficient aggravating circumstances exist as enumerated in subsection (5);

(b) Whether sufficient mitigating circumstances exist as enumerated in subsection (6), which outweigh the aggravating circumstances found to exist; and

(c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.

(3) FINDINGS IN SUPPORT OF SENTENCE OF DEATH.—Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:

(a) That sufficient aggravating circumstances exist as enumerated in subsection (5); and

(b) That there are insufficient mitigating circumstances, as enumerated in subsection (6), to outweigh the aggravating circumstances.

In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (5) and (6) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence, the court shall impose sentence of life imprisonment in accordance with s. 775.082.

(4) REVIEW OF JUDGMENT AND SENTENCE.—The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Florida within 60 days after certification by the sentencing court of the entire record, unless the time is extended for an additional period not to exceed 30 days by the Supreme Court for good cause shown. Such review by the Supreme Court shall have priority over all other cases and shall be heard in accordance with rules promulgated by the supreme court.

(5) AGGRAVATING CIRCUMSTANCES.—Aggravating circumstances shall be limited to the following:

(a) The capital felony was committed by a person under sentence of imprisonment.

(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

(c) The defendant knowingly created a great risk of death to many persons.

(d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.

(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital felony was committed for pecuniary gain.

(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital felony was especially heinous, atrocious, or cruel.

(6) MITIGATING CIRCUMSTANCES.—Mitigating circumstances shall be the following:

(a) The defendant has no significant history of prior criminal activity.

(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's conduct or consented to the act.

(d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.

(e) The defendant acted under extreme duress or under the substantial domination of another person.

(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(g) The age of the defendant at the time of the crime.

History.—s. 237, ch. 19554, 1939; CGL 1940 Supp. 8463.236; s. 139, ch. 70-339; s. 1, ch. 72-72; s. 9, ch. 72-724; s. 1, ch. 74-379; s. 248, ch. 77-104; s. 1, ch. 77-174.

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CASE NO. 81-5970

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

JESSIE JOSEPH TAFERO,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

JIM SMITH
Attorney General
Tallahassee, Florida

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QUESTIONS PRESENTED

I.

WHETHER THE TRIAL COURT WAS REQUIRED BY THE EIGHTH AMENDMENT TO CONDUCT AN INQUIRY INTO THE PETITIONER'S DECISION NOT TO PRESENT EVIDENCE IN MITIGATION IN THE PENALTY PHASE OF HIS TRIAL?

II.

WHETHER THE TRIAL COURT UNCONSTITUTIONALLY LIMITED CONSIDERATION OF THE MITIGATING FACTORS?

III.

WHETHER UNDER THE SIXTH AMENDMENT THE TRIAL COURT WAS REQUIRED TO CONDUCT AN INQUIRY INTO THE PETITIONER'S WAIVER OF HIS RIGHT TO SELF REPRESENTATION WHEN HE WAS REPRESENTED BY COUNSEL?

IV.

WHETHER A FEDERAL QUESTION ARISES FROM THE TRIAL COURT'S RULING ALLOWING THE STATE FO CALL A WITNESS WHOSE NAME WAS DISCLOSED TO THE DEFENSE ON THE DAY THE TRIAL COMMENCED?

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CASE NO. 81-5970

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

JESSIE JOSEPH TAFERO,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

STATEMENT OF THE CASE

The Petitioner was convicted in the Circuit Court of the Seventeenth Judicial Circuit, In and For Broward County, Florida, of two counts of first degree murder and one count each of robbery and kidnapping. He was sentenced to death for each of the murders, and to prison terms on the other convictions. The Florida Supreme Court, on direct appeal, affirmed both the judgments and sentences. Tafero v. State, 403 So. 2d 355 (Fla. 1981). (Petitioner's Appendix A). The Respondent relies on the account of the facts stated in the Florida Supreme Court's Opinion, Id. at 358 - 359, as its statement of the facts.

ARGUMENT AGAINST GRANTING THE WRIT

I.

THE EIGHTH AMENDMENT DOES NOT REQUIRE A TRIAL JUDGE TO CONDUCT AN INQUIRY AS TO WAIVER WHERE A DEFENDANT DOES NOT PRESENT EVIDENCE OR ARGUMENT IN MITIGATION AT THE PENALTY PHASE OF A CAPITAL SENTENCING PROCEEDING.

The Florida Supreme Court held that there was no error in the trial judge's failure to inquire into the Petitioner's waiving of his right to present evidence at the sentencing phase of the trial, because there was no indication that he did not know or understand this right. The Petitioner, represented by competent counsel, declined to present any evidence at the penalty phase (sentencing transcript, p. 47). This decision was no different than his decision not to present evidence at the guilt/innocence phase of the trial. His attorney's statement to the jury that the Petitioner didn't feel his trial was fair and he did not want to participate in the sentencing argument or to beg for mercy (sentencing transcript, p. 54) evidences that a tactical choice had been made by the Petitioner after consultation with his counsel. The failure of the trial court to inquire into the Petitioner's reasons therefore was never raised at that level,[1] but only on appeal and the Petitioner did not before the State Supreme Court and has not now presented any authority mandating such an inquiry.

The waiver of any presentation of evidence or argument in mitigation is not a waiver of a fundamental right, so the

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(1) See Wainwright v. Sykes, 433 U.S. 72 (1977)

Appellant's attempt to compare the instant case to Boykin v. Alabama, 395 U.S. 238 (1969) is unfounded. In Boykin the Court recognized that a guilty plea waives several federal constitutional rights, including the right against self incrimination, the right to jury trial, and to confrontation and cannot be presumed from a silent record. In capital cases, this Court has held that the Eighth Amendment requires that the capital sentencing system must allow for consideration of mitigating circumstances, i.e., the death penalty can not be mandatory for certain offenses. Woodson v. North Carolina, 428 U.S. 281 (1976). The Florida capital sentencing procedure is constitutional. Proffitt v. Florida, 428 U.S. 242 (1976). The Petitioner did not waive the entire penalty phase of the proceedings and in fact the jury was instructed on the appropriate factors to consider, so the proceeding was conducted in accordance with the statute. Therefore, there was no waiver analogous to the waiver of a jury trial, but merely a choice not to present evidence made by the Petitioner. The trial court was not required to inquire further, and the Petitioner has failed to demonstrate a constitutional question over which this Court should assume jurisdiction.

II.

THE TRIAL JUDGE DID NOT LIMIT CONSIDERATION OF MITIGATING FACTORS.

This Court upheld the Florida Capital sentencing statute and in so doing, specifically noted that the list of mitigating circumstances therein is not exhaustive. Proffitt v. Florida, 428 U.S. 242 (1976); See also, Spinkellink v. Wainwright, 578 F. 2d 582, 620,621 (5th Cir. 1978), cert.

denied, 440 U.S. 976; Songer v. State, 365 So. 2d 969 (Fla. 1978). The Appellant did not present any evidence in mitigation at the trial level and his belated attempt to raise it on appeal and then to argue it wasn't considered by the trial judge or jury is specious. Moreover, there were no objections to the alleged non-consideration of the non-existent mitigating factors at the trial level. Wainwright v. Sykes, supra.

The case of Washington v. Watkins, 655 F. 2d 1346 (5th Cir. 1981), is distinguishable from the instant case, since the faulty charge in Washington v. Watkins, supra, in addition to the possibly confusing parallel syntax, contained additional limiting language:

> If you find that one or more of the preceding elements exists, then you must consider whether it outweighs the aggravating circumstances. . .

There was no similar language used in the charge given in the instant case. Furthermore, the jury, unlike the jury in the cited case, was told the aggravating circumstances, "are limited to" . . . and these words did not reappear in the instructions on mitigating circumstances so there was no parallel syntax to confuse the jury.

Finally, the Appellant argues that the Florida Supreme Court in reversing a co-defendant's death sentence has found non statutory mitigating evidence which could also have been found in this case, citing, Jacobs v. State, 396 So. 2d 713 (Fla. 1981). In Jacobs there was no additional evidence presented at the sentencing phase, but the jury recommended a life sentence, and the Florida Supreme Court found that the jury

had probably considered certain non-statutory mitigating factors. The Court held the jury's recommendation was reasonable and should not have been overridden by the trial judge. These same factors did not exist in the instant case--the Court noted that Jacobs' role was passive and she was under the influence of her lover, the Petitioner--[1] and the jury in this case recommended death.

Therefore, the statute and the jury instructions did not limit consideration of the mitigating factors; there simply were none to consider. The Petitioner has not demonstrated constitutional error.

III.

THE PETITIONER WAS NOT ENTITLED TO "HYBRID" REPRESENTATION; THE TRIAL COURT WAS NOT REQUIRED TO DETERMINE WHETHER THE PETITIONER WAIVED HIS RIGHT TO SELF REPRESENTATION.

The Petitioner's claim that he was prevented from participating fully in his own defense is really a claim of right to act as co-counsel, a "right" that does not exist. State v. Tait, 387 So. 2d 389 (Fla. 1980); United States v. Daniels, 572 F. 2d 535, 540 (5th Cir. 1978); United States v. Bennett, 539 F. 2d 45, 49 (10th Cir. 1976). The Petitioner did not seek to proceed pro se; at all times during the case he accepted the representation by appointed counsel. Under the circumstances, the Petitioner was accorded his constitutional right to representation by counsel and there was no requirement

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(1) See Jacobs v. State, 396 So. 2d at 718.

that the trial court conduct an inquiry into whether the Petitioner waived his right to represent himself, a right that the Petitioner never sought to invoke.

The Respondent's position is supported by the recent decision of Brown v. Wainwright, __ F. 2d __, 5th Cir. Case No. 78-2532 (Op. filed 1/11/82)(en banc). In Brown, the Court held that the defendant's initial request to represent himself had been waived by his subsequent conduct, i.e., accepting appointed counsel's representation, and that a personal dialogue between the court and the defendant was not required. Thus, in the instant case, where there was no clear request to proceed pro se, the Petitioner's rights were protected and this Court need not assume jurisdictionl

IV.

THERE IS NO FEDERAL QUESTION ARISING FROM THE TRIAL COURT'S ALLOWING THE STATE TO CALL A WITNESS WHOSE NAME WAS DISCLOSED ON THE DAY THE TRIAL COMMENCED, FIVE DAYS BEFORE THE WITNESS TESTIFIED.

The Petitioner's claim in the State court was first that he was:

> Denied the due process of law by the trial court's failure to exclude the testimony of Ellis Marlowe Haskew or to grant a continuance to allow time for investigation after a clear violation of the rules of discovery by the State. [Emphasis added] (Appellant's brief, point III).

His primary complaint under this point was that because the prosecutor didn't supply the defense with the witness Haskew's

name until the day the trial commenced, that the Florida discovery rule, Fla.R.Crim.P. 3.220(a)(i), was violated. There is no federal constitutional right to discovery in a criminal case except as to the disclosure of favorable evidence upon demand required by Brady v. Maryland, 373 U.S. 83 (1963). Moore v. Illinois, 408 U.S. 786 (1972); Weatherford v. Bursey, 429 U.S. 545, 559 (1977). Thus, this matter concerned merely a question of State law in which the Petitioner's federal constitutional rights were not implicated.

The Petitioner's second point in regard to Haskew's testimony was that he:

> Was denied due process of law by the State's failure to produce evidence which is materially favorable to the accused. (Appellant's brief, Point IV).

This matter was never raised at the trial court level and furthermore, the Petitioner made no specific request for the evidence he now claims was suppressed, so Brady v. Maryland, supra, is inapplicable. Additionally, in United States v. Diecidue, 448 F. Supp. 1101 (M.D. Fla. 1978), the Court held that the same omitted evidence--the fact that Haskew's attorney was paid by a State agency--would not have affected the verdict and its non disclosure was harmless under the standard of United States v. Agurs, 427 U.S. 97 (1976).

CONCLUSION

WHEREFORE, the Respondent respectfully requests that this Honorable Court DENY the Petitioner's Petition for Writ of Certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished this 18 day of January, 1982, to Honorable Craig S. Barnard, Assistant Public Defender, 224 - Datura Street, 13th Floor, Harvey Building, West Palm Beach, Florida, 33401, by Courier.

Of Counsel